QUESTIONS PRESENTED

1. Whether under the federal common law that governs employee benefit plans, questions of interpretation concerning plan instruments are for the courts or for plan administrators to decide in cases in which it is the administrator's self-interest to construe the plan against the putative participants and in which the plan itself does not vest the administrator with the power to authoritatively determine the meaning of the plan?

2. Whether an employee or former employee who asserts a claim for benefits under an employee benefit plan is entitled, upon request, to receive a copy of the document which sets forth the terms of the plan?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1054

THE FIRESTONE TIRE & RUBBER CO., *et al.*,
Petitioners,

v.

RICHARD BRUCH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS

The citation to the opinions below and the basis for this Court's jurisdiction are correctly set forth in petitioner's brief at pp. 1-2. Certain of the statutory provisions involved in this case are reprinted in the Appendix to the Petition for a Writ of Certiorari at pp. A77-A85. In addiiton, §§ 101(a), 409, 502(a), (c) and 503 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1021(a), 1109, 1132(a), (c), 1133, are pertinent here; those sections are reprinted as an appendix to this brief.

COUNTERSTATEMENT OF THE CASE

Statement of Facts

Until 1980, respondents and the more than 500 class members they represent (collectively referred to as "plaintiffs") were salaried employees of the Plastics Division of petitioner Firestone Tire & Rubber Co. ("Firestone" or "the Company"). In November, 1980, Firestone sold that Division to Occidental Petroleum Corporation ("Occidental"). Plaintiffs were terminated as employees of Firestone and were hired as employees of Occidental. Pet. App. A4.[1]

As a result of having been terminated by Firestone, plaintiffs ceased accruing service under Firestone's Retirement Plan for Salaried Employees; thus plaintiffs' Firestone pension rights were frozen at their then-current levels and plaintiffs lost the opportunity to take early retirement upon reaching age 55 or upon completing ten years of service. *See* Pet. App. A33-A36.[2] Similarly, because they were terminated, plaintiffs ceased accruing service under Firestone's Stock Purchase and Savings Plan and forfeited any unvested stock. *See* Pet. App. A4-A5, A63. And plaintiffs were placed under Occidental's health insurance plans which provided a lower level of benefits than Firestone's plan.[3]

At the time plaintiffs were terminated, Firestone maintained a severance pay plan for its salaried employees. Those employees were notified of the existence of that plan by virtue of the "Handbook for Firestone's Salaried Employees" which was given to each salaried employee, and which under the heading "Your Benefits" included the following section:

Termination Pay

> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your jobs.
>
> The amount of termination pay you will receive will depend on your period of credited company service. [Pet. App. A48]

The terms of Firestone's severance plan were set forth in Firestone's Salaried Personnel Manual, a confidential document distributed only to personnel managers and senior management executives, J.A. 121, and the existence of which was unknown to at least some of the plaintiffs.[4]

[1] The record indicates that there was an "understanding[]" between Firestone and Occidental—one that was "not expressly memorialized" in their contract—that Occidental would hire all of Firestone's employees; indeed Occidental viewed it as in its self-interest to do so and Occidental "was concerned that everything possible be done to prevent employees from resigning." Affidavit of Richard Jöhnson, October 24, 1985, ¶¶ 2, 3.

Occidental did not *retain* all of Firestone's salaried employees, however; beginning in 1982 Occidental shut down two of the five plants it had purchased from Firestone and reduced forces at other plants. *See* Deposition of James Reder, August 27, 1984, at 76-82.

[2] Under the Firestone pension plan, only one who was actively employed by Firestone immediately prior to retiring could elect early retirement; once terminated, therefore, plaintiffs lost the opportunity to take early retirement as well as the opportunity to earn higher pension benefits by accruing additional service and by obtaining salary increases.

Plaintiffs did, of course, begin to accrue service under Occidental's plan (at least for so long as plaintiffs remained employed by Occidental, *see* n.1 *supra*), but plaintiffs were required to satisfy new vesting requirements and had no assurance that their net pensions upon retirement would equal the pensions plaintiffs would have received had they remained employed by Firestone.

[3] *See* Affidavit of Richard Bruch, ¶ 15; Second Affidavit of Richard, ¶ 5.

[4] *See* Affidavit of Richard Bruch, ¶ 6. Although the Manual was deemed confidential by Firestone, an employee who was aware of the Manual's existence and who requested to see a specific policy

The Manual defines the operative phrase "reduction in work force" as the "Termination of employment by the Company, without prejudice to the employee." (§ 1.54) The Manual goes on to define the other types of termination of employment ("resignation," "separation," "discharge," "retirement," and "death") (§ 1.54); to require that "[a]ll terminating employees must have an exit interview to establish the true cause of termination" (§ 1.51); and to state the amount of severance pay—two weeks' pay per year of service—for employees "terminated under the Reduction-in-Force policy." (§ 2.11.3(C)).[5]

At the time of the events in question, Firestone had not appointed any "board, committee or trustees to ad-

in the Manual could go to the personnel office at the employee's plant and review the policy in question with a personnel representative. J.A. 121.

[5] The pertinent provisions of the Manual appear at pp. 263-79 of the joint appendix that was filed in the court of appeals.

After Firestone had reached the agreement with Occidental to sell the Chemical Division but before the sale became effective, Firestone amended its Manual by adding the following two prefatory paragraphs to the section on severance pay (§ 211.3):

> Despite the objectives of Firestone to provide stable employment, continued earnings and benefit coverage to its employees, there may be economic conditions that develop which make it necessary for the company to temporarily or permanently terminate the employment of some of its work force.
>
> In the event such releases must be made, the following reduction in force policies have been established with the goal of minimizing the economic and mental stress of terminated employees during the period of time between release from Firestone and securing their employment (or reemployment by Firestone).

In the courts below, Firestone cited to these additions to the Manual to support its decision to refuse severance pay to plaintiffs; the district court declined to rely on these additions because they were adopted only one month before the sale was consummated. *See* Pet. App. A69.

minister the severance pay plan"; instead, according to Thomas Robinson, Firestone's Director of Compensation and Management Development, the plan was administered by "personnel managers in our various locations, using policy as a general guideline" and where severance pay was awarded, the payment was made out of Firestone's general treasury, rather than out of a trust or other segregated fund.[6] Moreover, as Robinson also testified, as of the time of the sale Firestone was "unaware" that its "termination pay policy" was regulated by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq ("ERISA"). J.A. 125.

Lacking any administrator or other structure for its severance pay plan, upon consummating the sale to Occidental Firestone decided, through its corporate officers, not to assume the substantial cost—in excess of six million dollars—of paying severance pay to its over 500 salaried employees.[7] Instead, Firestone concluded that the termination of its employees did not constitute a "reduction in force" as that phrase is defined in the Manual, *viz.*, a "termination without prejudice to the employee."

Two of the named plaintiffs wrote to Firestone concerning the denial of termination pay. By letter dated March 7, 1981, plaintiff Leonard Smolinski "ma[de] application for my severance pay which is due me" and stat[ed] that if "my request is denied, I would like a

[6] Deposition of Thomas Robinson, May 2, 1983, at 90-91; *see id.* at 153-54.

[7] The record contains an internal Firestone memorandum obtained through discovery (and reprinted at p. 220 of the joint appendix in the court of appeals) stating that if severance pay were awarded at the rate of one month pay per five years of service, the cost to Firestone would be $3,100,000. Paying severance pay at the rate of two weeks per year of service as provided for in the Manual would more than double that cost.

written statement vertifying this fact"; Smolinski did not receive any response to this request.[8] Similarly, on May 4, 1981, plaintiff Albert Schade wrote to Firestone requesting "our outline and/or contract on company severance" and "the provision of severance from the company"; Firestone responded to Schade's letter by stating its conclusion that because Schade was rehired by Occidental the "termination provisions do not apply," but Firestone did not provide Schade with the documents he had requested.[9]

Prior Proceedings

On July 29, 1982, plaintiffs commenced this action under § 502 of ERISA, 29 U.S.C. § 1132, challenging, *inter alia*, Firestone's refusal to pay severance pay to its terminated salaried employees and Firestone's failure to provide requested documents to the named plaintiffs who made such requests.[10] On cross-motions for summary judgment the district court ruled for Firestone on all counts and dismissed the complaint. The district court "conclude[d] that Firestone's decision not to pay plaintiffs and the employees they represent termination

[8] *Id. Deposition of Leonard Smolinski*, April 22, 1983, at 30 & Exs. 90-92. Smolinski also requested information on retirement benefits and he received four letters in response to that request, none of which addressed Smolinski's request for a "written statement" with respect to this entitlement to severance pay.

[9] Deposition of Albert Schade, April 21, 1983, at 50 & Exs. 31, 31-A. In addition to the information requests described in text, plaintiff Richard Bruch, who as a result of being terminated forfeited 200 shares of unvested stock in Firestone's Stock Ownership Plan, *see* Second Affidavit of Richard Bruch ¶ 5, wrote to Firestone on May 4, 1981 and again on May 26, 1981 requesting a copy of the "complete plan"; Firestone did not respond to either of Bruch's letters. Deposition of Richard Bruch, February 23, 1983, at 66 & Dep. Ex. 29.

[10] Plaintiffs also challenged decisions Firestone had made, upon terminating plaintiffs' employment, with respect to plaintiff's entitlements' under the pension plan, the stock plan, and Firestone's vacation plan. Those counts were either withdrawn or dismissed and are no longer involved in this case.

pay benefits was not arbitrary and capricious and defendants are entitled to summary judgment on this count." Pet. App. A56. And having decided that plaintiffs were not entitled to severance pay as of the time of the sale, the district court concluded that plaintiffs were therefore not at that time "participants or beneficiaries" of Firestone's severance pay plan and were not entitled to information under § 104(b)(4) of ERISA, 29 U.S.C. § 1024(b)(4). *See* Pet. App. A70-A72.

Plaintiffs appealed and the court of appeals (per Becker, J.) reversed the district court's judgment on the two issued noted above. Concluding that "the decision by Firestone to deny benefits under the termination pay plan should be reviewed de novo by the [district] court," the Third Circuit remanded the severance-pay claim "so that the district court can decide the proper construction of the relevant plan language." Pet. App. A3. And concluding that the disclosure requirement contained in ERISA § 104(b)(4) "would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not" the court of appeals remanded the information claim to enable the district court to "exercise [its] discretion" in "determin[ing] how much the claimant should receive in damages." Pet. App. A42, A3-A4.

On April 4, 1988, this Court granted Firestone's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I. The principal issue addressed by Firestone concerns the scope of review under ERISA of decisions made by one acting as a fiduciary to deny benefits under an employee benefit plan. But that question is not squarely raised by this case. In the courts below Firestone conceded that in deciding to deny severance pay to plaintiffs, Firestone "was unaware that ERISA applied to termination pay," and that Firestone did not pur-

port to make its decision as a fiduciary; rather, Firestone acted *as an employer*, taking into account its own financial interests. There is, therefore, no room for Firestone to claim whatever shield of deference the law provides to those acting as a fiduciary to defend a decision the Company admittedly made *qua* employer. Accordingly, this Court may wish to dismiss the writ of certiorari as improvidently granted. Pp. 12-15.

II. If Firestone had acted as a fiduciary, the Court would confront the question of whether under ERISA the courts are to defer as a matter of course to benefit decisions of the type involved here.

A. Prior to the enactment of ERISA, there would have been no basis for such deference. Pre-ERISA, a suit like this would *not* have implicated the law of trusts for the simple reason that, in adopting its severance pay plan, Firestone did not choose to create a trust; rather, Firestone's severance pay plan was unfunded. And under pre-ERISA law it was well-established that a suit seeking redress for an employer's denial of unfunded welfare benefits sounded in contract. In such cases—as in contract suits generally—the courts interpreted the contract to determine whether an employer's refusal to pay constituted a breach of contract. In arguing for deferential review here, Firestone is thus reduced to claiming that ERISA worked a substantial *diminution* of the preexisting, contractual rights of employees under unfunded welfare plans. Pp. 16-19 *infra*.

B. In enacting ERISA "Congress intended benefits decisions to be committed to the authority of fiduciaries who would be subject to standards that had been developed in the common law of trusts," as Firestone correctly states. But under ERISA, plan administrators also have duties imposed by "the terms of [a] plan," and ERISA § 502(a)(1)(B) creates a discrete cause of action to enforce these latter duties. Such actions—of which the instant case is one—are to be resolved

under a "federal common law of rights and obligations under ERISA-regulated plans," *Pilot Life Insurance Co. v. Dedeaux*, —— U.S. ——, 55 L.W. 4471, 4475 (April 6, 1987), fashioned out of the policies of ERISA and drawing upon state law to the extent such law helps effectuate those policies. The task here, then, is to define, the federal common law rule with respect to the appropriate scope of judicial review of claims of the type plaintiffs here assert. Pp. 19-24 *infra*.

C. (1) Plaintiffs here are not challenging the exercise of any authority which is inherently discretionary in nature. Firestone's severance pay plan did not leave decisions as to severance pay eligibility to the judgment of the plan administrator; rather the plan requires that severance pay be provided to every employee terminated due to a "reduction in force" and to no others. In deciding whether to award severance benefits Firestone's task, as plan administrator, was to reach a decision as to whether the term "reduction-in-force" as used in the plan encompasses terminations resulting from the sale of a plant as an ongoing business. That is as pure a question of plan interpretation as can be imagined.

Nothing in the plan instrument purports to commit such a decision to the discretion of the plan administrator or to render the administrator's interpretation of the plan conclusive. Moreover, in interpreting the plan, Firestone faced a conflict of interest to a degree unknown to the law of trusts: because the severance pay plan is unfunded, any benefits that Firestone, as administrator, concluded were owed under the plan would be paid directly out of its pocket, as employer, rather than out of any trust fund. Thus, the question posed here is whether under the federal common law of employee benefit plans, the federal courts are required to defer to the interpretation of plan instruments adopted by a self-interested employer/plan administrator where the plan instruments themselves do not purport to vest the ad-

ministrator with the power to authoritatively determine the meaning of those documents. Pp. 24-27 *infra.*

(2) Nothing in ERISA's bare words conclusively answers that question nor is there anything in the legislative history directly on point. But the policies underlying ERISA require the courts to formulate federal common-law rules which will "promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1985), and "protect contractually defined benefits," *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). And these policies do not permit a rule which would empower the self-interested employer/administrator to determine the proper meaning of the plan instrument where that authority is not conferred on the administrator by the instrument. Rather, at least in such cases, questions of plan interpretation should be resolved, as a matter of federal common law, by the courts. Pp. 27-30 *infra.*

(3) Contrary to Firestone's suggestions, the law of trusts does not support a contrary conclusion; rather, that law compels the same conclusion as the one derived from ERISA's policies. The law of trusts does defer to a trustee's exercise of discretionary authority, but trust law empowers the courts to direct trustees to perform mandatory functions. And trust law does not treat the power to interpret a trust instrument as a discretionary function of the trustee; rather, like contract law, trust law assumes that it is ordinarily for the courts to determine the meaning of legal documents, including trust instruments, unless something in the trust instrument itself provides for a different division of authority. Thus, pre-ERISA, where trusts were created to provide employee benefits, the courts would defer to the trustees' interpretation of the trust documents if the documents themselves so provided, but otherwise the courts proceeded on the premise that it was a judicial responsibility to determine the meaning of the trust instrument. Pp. 30-35 *infra.*

III. Plaintiffs' complaint also sought damages for the three individual plaintiffs whose requests for copies of Firestone's severance pay and stock plans were ignored by the Company. Firestone's defense—that at the time of these requests the plaintiffs were no longer "participants" in the plans and hence were not entitled to information about the plans—is without merit.

A. ERISA contains two types of disclosure provisions: those requiring disclosure automatically and without request and those requiring disclosure in response to specific information requests. The former provisions run only to "participant[s] covered under the plan"; the Department of Labor has authoritatively construed that phrase to be a term of art and has defined it in a complex set of regulations. The latter provisions—requiring disclosure only on request—run to "any participant," a broader class which, in the Labor Department's view encompasses "many individuals whose interest in an employee benefit plan is minimal." 40 Fed. Reg. 24,642. It is the scope of that broader class that is at issue here. Pp. 36-39 *infra.*

B. ERISA defines "participant" to mean "any employee or former employee . . . who is or may become eligible to receive a benefit. . ." This definition is sufficiently broad to encompass former employees who claim to be entitled to benefits and thus "may become eligible" based on a subsequent determination of their entitlement. And Congress' intent to use the term in this way is clear both from the other contexts in the Act in which the term "participant" is used—most significantly, the section of the Act requiring benefit plans to establish a claims procedure for "*any participant* whose claims for benefits has been denied"—and also by the legislative history of the disclosure provisions which show that those provisions were intended to enable employees and former employees to obtain the information needed to determine whether they have valid claims under a plan. Pp. 39-46 *infra.*

ARGUMENT

I. BECAUSE FIRESTONE DID NOT PURPORT TO ACT AS A FIDUCIARY IN DENYING SEVERANCE PAY TO PLAINTIFFS, THIS CASE DOES NOT SQUARELY RAISE ANY QUESTION AS TO THE SCOPE OF REVIEW OF DECISIONS MADE BY ONE ACTING AS A FIDUCIARY.

Firestone's essential argument in this case is that in enacting ERISA, "Congress intended courts reviewing fiduciaries' benefits decisions to apply a deferential standard," Pet. Br. at 14, even where, as here, "a fiduciary has a conflict of interest," Pet. Br. at 20. But as the Chamber of Commerce and the National Association of Manufacturers acknowledge in their joint brief *amici curiae* (at 23 n.24), "This case is in a slightly unusual posture because respondents did not file any claim for severance pay with an administrator of the Firestone benefit plan." Thus, insofar as the court of appeals "analyzed the case under trust principles," its decision rests on an "*assumption* that the interpretation of the severance pay plan challenged by respondents was that of a fiduciary." *Id.* (emphasis added). The arguments of Firestone and its *amici curiae* are "based on the same assumption." *Id.*

That assumption is *contrary to fact*: Firestone did *not* purport to act as a fiduciary when the Company denied severance pay to plaintiffs. And on reflection, it seems to us that the Chamber and the NAM are correct in identifying that fact as pivotal to proper analysis of the problem posed here. Thus, it now seems to us that this case raises only a narrow question as to the appropriate scope of review of the decisions of one who should have but did *not* assume a fiduciary role in rendering benefit decisions, and that it is therefore incumbent upon us to suggest that the Court may wish to dismiss the writ of certiorari as improvidently granted or to adjudicate this case without addressing the broader issues

raised by Firestone concerning the scope of review under ERISA of decisions made by those acting in a fiduciary capacity.

A. There is no doubt that under ERISA the decision to grant or deny severance pay to plaintiffs *should* have been made by a fiduciary acting as such. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), expressly requires that employee benefit plans "be established and maintained pursuant to a written instrument," which instrument "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." Section 404, 29 U.S.C. § 1104, in turn, requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." Thus, under the Act, the decision whether to grant severance benefits to plaintiffs was to have been made by a fiduciary acting "solely in the interest of the participants and beneficiaries."

But, as noted in the Statement of Facts, at the time of the events in question in this case, Firestone did not understand that its policy of paying severance pay constituted an "employee welfare plan" regulated by ERISA. P. 5 *supra*. Firestone conceded as much in both the district court and the court of appeals. Thus, in opposing plaintiffs' motion for summary judgment in the district court Firestone stated:

> [U]ntil judicial decision in the early 1980's established that termination pay is a welfare benefit covered by ERISA, Firestone was unaware that ERISA applied to termination pay. [Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, December 6, 1985, at 33 n.12.]

And in the court of appeals Firestone acknowledged that the Company "had not before the sale [of the Plastics Division] treated its termination pay policies as an ERISA plan." Brief for Def. in C.A. No. 86-1448 at 24.

Consistent with these concessions, the record reflects that as of the time of the events at issue here, Firestone had not met *any* of ERISA's obligations with respect to severance plans. Firestone had *not* prepared a "written instrument" meeting the requirements of ERISA § 402;[11] Firestone had *not* prepared and distributed to employees a "summary plan description" for its plan, as required by ERISA § 102, 29 U.S.C. § 1021; Firestone had *not* prepared annual reports with respect to the plan as required by ERISA § 103, 29 U.S.C. § 1022; and Firestone had *not* established a procedure to enable those whose claims are denied to obtain "full and fair review" as required by ERISA § 503, 29 U.S.C. § 1133. Most important of all, the record reflects that at all times relevant herein Firestone had *not* appointed any "named fiduciaries . . . to control and manage the operation and administration of the plan" as required by ERISA § 402, 29 U.S.C. § 1102.

In the absence of a named fiduciary to administer the plan, Firestone, by operation of law, became the administrator, *see* ERISA § 3(16(A)(ii), 29 U.S.C. § 1002(16)(A)(ii), and, by operation of law, Firestone was a fiduciary with respect to the severance pay plan, *see* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). But the fact remains that in denying severance pay to plaintiffs Firestone was unaware of the applicability of ERISA and Firestone did *not* purport to act as a fiduciary. Rather, Firestone acted as an *employer* taking into account the range of interests that are relevant to

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[11] Under § 402(c), the required written instrument must, *inter alia*, "describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan" and "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." Neither Firestone's Handbook nor its Manual—the only written documents with respect to the severance pay plan, *see* pp. 3-4 *supra*—satisfied these requirements.

employers, including, of course, the Company's financial interest.

B. Against this background, there is simply no room for Firestone to claim whatever shield of deference the law provides to those acting as fiduciaries to defend a decision the Company admittedly made *qua* employer. Insofar as deference is owed to a fiduciary's judgment as to whether a particular plan requires the payments of benefits to particular claimants—an issue we discuss in Part II *infra*—the *sine qua non* for any such deference is that the judgment was rendered by one acting as a fiduciary.

Trust law treats fiduciary decisions as a special class because fiduciaries undertake to act according to a special—and heightened—code of responsibility to the trust beneficiaries: "[n]ot honesty alone but the punctilio of an honor the most sensitive is . . . the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 454, 546 (1928) (Cardozo, C.J.). And whatever deference is paid to fiduciary decisions results from the courts' reluctance, absent proof of neglect by the fiduciary, to overturn a fiduciary's judgment as to how best to further the interests of the beneficiaries the fiduciary is charged with protecting. *See also* p. 24 *infra*.

That rationale by its terms is *inapplicable* where, as here, the decision under review was *not* made by one acting as a fiduciary but rather was made by an employer acting as an employer. To defer to such a decision would turn ERISA (and trust law) on its head.

For this reason we respectfully submit that the case does not raise any question concerning the scope of review of decisions made by one acting as a fiduciary, and the case therefore may not be worthy of a plenary decision by this Court.

II. EVEN IF FIRESTONE HAD ACTED AS A FIDUCIARY IN INTERPRETING THE SEVERANCE PAY PLAN TO BE INAPPLICABLE TO PLAINTIFFS, FIRESTONE'S SELF-INTERESTED INTERPRETATION OF THIS LEGAL DOCUMENT WOULD BE SUBJECT TO *DE NOVO* JUDICIAL REVIEW.

If, contrary to what we have just shown, Firestone had acted as a fiduciary in concluding that plaintiffs had not suffered a "reduction-in-force" within the meaning of the severance pay plan, the Court would then confront the question of whether, as Firestone claims, in enacting ERISA Congress intended the courts to "apply a deferential standard" of review as a matter of course to decisions of this nature. Pet. Br. at 14. It is to that question that we now turn.

A. Prior to the enactment of ERISA, there would have been no doubt as to the appropriate judicial role in adjudicating plaintiffs' claim that Firestone had misinterpreted the term "reduction-in-force" as used in the Handbook and Manual and, on the basis of that misinterpretation, had wrongfully failed to make severance payments to plaintiffs.

Pre-ERISA, a suit like this would not have implicated the historic law of trusts for the simple reason that, in adopting its severance pay plan, Firestone did not choose to create a trust. "A trust cannot be created unless there is trust property of such a nature as to be the proper subject of a trust." *Restatement (Second) of Trusts* § 66; *see* 2A A. Scott, *Scott on Trusts* §§ 66, 74 (4th ed. 1988). Yet Firestone's severance pay plan was entirely unfunded (as ERISA permits, *see* ERISA § 301(a)(1), 29 U.S.C. § 1081(a)(1)); Firestone did not dedicate any assets for the payment of severance benefits but rather elected to make such payments out of the Company's general treasury. Thus, pre-ERISA, plaintiffs could not have attempted to enforce the severance pay plan as a trust.[12]

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[12] *A fortiori*, plaintiffs could not have sought review of Firestone's actions under § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 ("LMRA"), as that provision by its terms applies only to a special class of "trust fund[s]," *viz.*, those in which union representatives and employer representatives jointly serve as trustees.

Rather, under pre-ERISA law it was well established that a suit like this seeking redress for an employer's denial of unfunded welfare benefits to which employees claimed an entitlement sounded in *contract*.[13] Except in those cases in which the plan/contract expressly reserved to the employer the final authority to interpret the eligibility conditions of the plan,[14] the courts in these suits proceeded, as in any other contract case, to interpret the contract in accordance with standard principles of contract interpretation in order to determine whether a breach had occurred. *E.g.*, *Conner v. Phoenix Steel*, 249 A.2d 866 (Del. Sup. Ct. 1969); *Hart v. Carpenters Local 626*, 352 A.2d 423 (Del. Super. Ct. 1976); *Kitchens v. Atlantic Steel Co.*, 123 Ga. App. 812, 182 S.E.2d 530 (1971), *aff'd*, 228 Ga. 708, 187 S.E.2d 824; *Dangott v. ASG Industries, Inc.*, 558 P.2d 379 (Okla. Sup. Ct. 1976); *Rudditys v. Wing*, 81 Wis. 2d 667, 260 N.W. 2d 794 (1978); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980); *see also, e.g.*, *Frietzsche v. First Western Bank & Trust Co.*, 168 Cal. App. 2d 705, 336 P.2d 589 (1959); *Bird v. Connecticut Power Co.*, 144 Conn. 456, 133 A.2d 894 (1957); *Stevenson v. ITT Harper, Inc.*, 51 Ill. App. 3d 568, 366 N.E. 2d 561

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[13] *See, e.g.*, 1 A. Corbin, CORBIN ON CONTRACTS § 125 p. 536 & n.68 (1950); 9 WILLISTON ON CONTRACTS § 1019 (3rd ed. 1967); Ziskind, *The Law of Employee Benefit Plans*, 1955 Wash. U. L.Q. 112, 117 (1955); Note, *Pension Plans & the Rights of the Retired Worker*, 70 Colum. I. Rev. 909, 917 (1970); *see also* S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 312-13 (1988).

[14] *E.g.*, *Clark v. New England Telephone*, 118 N.E. 348 (Mass. 1918); *McHorse v. Portland General Electric Co.*, 286 Ore. 323, 521 P.2d 315 (1974); *Rueda v. Union Pacific Railroad Co.*, 180 Ore. 133, 175 P.2d 778 (1946).

(1977); *Jacoby v. Gray's Harbor Chair & Mfg. Co.*, 77 Wash. 2d 911, 468 P.2d 666 (1970).[15]

Against this background, Firestone and its supporting *amici curiae* are reduced to arguing that ERISA worked a substantial *diminution* of the preexisting rights of employees under unfunded welfare plans. Without so acknowledging, Firestone's contention is that in ERISA Congress took from employees what were enforceable *contractual rights* to welfare benefits and left these employees instead with nothing more than a right to be free from arbitrary or capricious action by the employer in deciding whether benefits are owed under the plan. According to Firestone, that consequence follows from the fact that ERISA imposes an obligation on those responsible for administering employee welfare plans to act as fiduciaries; because plan administrators are fiduciaries, Firestone contends, all of their actions—including their actions in interpreting plan documents—"are governed by trust principles, which include a deferential standard of judicial review." Pet. Br. at 9. As we proceed to show, Firestone's contention profoundly misunderstands both ERISA and the common law background against which the statute was enacted.

Our argument proceeds in two steps. In Part B we show that in addition to imposing fiduciary duties upon plan administrators and creating a cause of action to enforce those duties, ERISA also requires plan administrators to comply with duties imposed by the employee benefit plan *itself*, and ERISA creates a discrete cause of action to enforce such duties. Such actions—of which the instant case is one—are to be adjudicated under a judicially-developed "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Insurance Co. v. Dedeaux*, —— U.S. ——, 55 L.W. 4471, 4475 (April 6, 1987).

In Part C we show that under the federal common law, no deference is owed to a self-interested administrator's interpretation of the meaning of plan instruments, at least where, as here, nothing in the instruments themselves purport to commit such questions of interpretation to the discretion of the administrator. As we demonstrate, that conclusion is required both by the policies underlying ERISA and also by the law of trusts.

B. (1) There is no doubt that, as Firestone states, in enacting ERISA "Congress intended benefits decisions to be committed to the authority of fiduciaries who would

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[15] Firestone is thus simply wrong in asserting, Br. at 25 n.22, that "[b]efore ERISA became effective, the decisions of employers who administered plans that were not governed by the LMRA were reviewed under the arbitrary and capricious standard." The handful of cases Firestone cites to support that proposition were all cases in which the employer *had created a funded trust* to administer a particular benefit plan, *and the trust instrument expressly reserved to the trustees the final authority to interpret the document and award benefits*. (The same is true of the cases the Chamber of Commerce and National Association of Manufacturers cite, Br. at 13-14, to support a similar claim.)

Firestone is equally wrong in claiming that the decision below, by subjecting Firestone's interpretation of the severance pay plan to *de novo* review, deviates from the "unanimous case law" in the lower courts under ERISA. Pet. Br. at 6. Although it is true that "[e]very circuit, including the Third Circuit, has approved application of the 'arbitrary and capricious' standard of judicial review" in reviewing certain benefit disputes under ERISA, *see* Pet. Br. at 8 & cases cited n.5, most courts of appeals also have reviewed *de novo* other types of benefit denials in unfunded plans—most often denials of health-care coverage to retired employees—in suits brought under ERISA. *E.g.*, *Steelworkers v. Connors Steel Co.*, 847 F.2d 707 (11th Cir. 1988); *Anderson v. Alpha Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988); *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986); *Mine Workers District 29 v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). In other cases the courts have "appl[ied] the arbitrary and capricious standard in name only." *Van Boxel v. Journal Co.*, 836 F.2d 1048, 1051 (7th Cir. 1987) (Posner, J.), *citing, e.g.*, *Haln v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983).

be subject to standards that had been developed in the common law of trusts." Pet. Br. at 14. As previously noted, ERISA § 402, 29 U.S.C. § 1101, requires every employee benefit plan to provide for "one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." And ERISA § 404, 29 U.S.C. § 1104, in turn, imposes on a fiduciary, in "discharg[ing] his duties with respect to a plan" a set of obligations, "derived from the common law of trusts," *Central States Pension Fund v. Central Tranp.*, 472 U.S. 559, 570 (1985), including the obligation to act "solely in the interest of the participants and beneficiaries" of the plan, and the further obligation to act "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1), (a)(1)(D). Congress thus "intended these fiduciary standards to govern the ERISA claims-administration process." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 153 (1985) (Brennan, J., concurring).

It does not follow, however, as Firestone seems to believe, that § 404 states the *only* obligations of the fiduciary in making eligibility determinations, or that a suit for breach of the fiduciary duties is the *only* cause of action available to an employee who has been denied pension or welfare benefits. Firestone is able to make that claim only by ignoring § 502(a) of the Act, 29 U.S.C. § 1132(a)—ERISA's civil enforcement provision—which this Court has described as "one of the essential tools for accomplishing the stated purposes of ERISA," *Pilot Life Insurance Co. v. Dedeaux*, *supra*, 55 L.W. at 4474.[16] That section, insofar as relevant

[16] Firestone cites that section only once in passing in its 24-page discussion of the standard of review and, remarkably, Firestone has not even included § 502(a) in its compilation of statutory provisions involved in this case even though this is an action under § 502(a) to recover benefits claimed to be due.

here, creates three discrete causes of action in favor of plan participants to enforce discrete duties under the Act.[17]

First, § 502(a)(1)(B) authorizes a participant or beneficiary to sue

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

Second, § 502(a)(2) authorizes participants and beneficiaries to sue "for appropriate relief under section 409, [29 U.S.C. § 1109,]" the section of the Act which defines the remedies that may be obtained from a "fiduciary . . . who breaches any of the responsibilities obligations, or duties imposed upon fiduciaries by this title." And, finally, § 502(a)(3) authorizes suits by a participant or beneficiary

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan.

By its plain terms, then, § 502 recognizes that plan administrators are under *two discrete sets* of obligations: the fiduciary duties imposed by the Act itself and the separate duties imposed by "the terms of [a] plan." And § 502(a)(1)(B)—which "lies at the heart of [the] statute," *Metropolitan Life Insurance Co. v.*

[17] The fourth cause of action in favor of participants—created by subsection (1)(A) of § 502(a)—is an action for "the relief provided for in subsection (c)" of § 502, 29 U.S.C. § 1132(c); that subsection in turn authorizes the recovery of damages from a plan administrator "who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary." The second claim in this case arises under this subsection. *See* pp. 35-46 *infra*.

Taylor, — U.S. — , 55 L.W. 4468, 4470 (April 6, 1987) —creates a discrete cause of action to enforce these latter duties. Through this cause of action a participant may obtain "accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits." *Pilot Life Insurance Co. v. Dedeaux, supra*, 55 L.W. at 4474; *see Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 474 U.S. at 146.[18]

(2) In enacting § 502(a)(1)(B) Congress declared that the actions thus authorized "are to be regarded as arising under the laws of the United States in similar fashions to those brought under § 301 of the Labor Management Relations Act [, 29 U.S.C. § 185]." H.R. Rep. 93-1280, 93rd Cong. 2d Sess. 32 (1974) (conference report), *reprinted in*, 3 *Legislative History of the Employee Retirement Income Security Act of 1974* at 4594 (hereinafter "Leg. Hist."). *See also* 3 Leg. Hist. 4745 (Senator Williams in introducing the conference report). Moreover, Congress made clear that just as the courts have developed a federal common law of labor contracts under LMRA § 301, *see Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), so, too, Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942, 3 Leg. Hist. at 4771 (Sen. Javits). Thus, "all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-

[18] Indeed, a suit under § 502(a)(1)(B) to enforce a plan may provide the *only* means by which participants can recover benefits due them. As noted in text, § 502(a)(2) provides for "relief under section 409" as the remedy for a breach of a fiduciary obligation and § 409 in turn provides "remedies that would protect the entire plan rather than . . . an individual beneficiary." *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. Similarly, an action lies under § 502(a)(3) only "*to enjoin*" fiduciary breaches or to "obtain other appropriate *equitable relief*."

regulated plans [must] be treated as federal questions governed by § 502(a)" and must be resolved under a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Insurance Co.* v. *Dedeaux, supra*, 55 L.W. at 4475.

The federal common law of labor contracts has been "fashion[ed] from the policy of our national labor laws." *Textile Workers v. Lincoln Mills, supra*, 353 U.S. at 456. In developing that law the Court has recognized that the LMRA itself "expressly furnishes some substantive law" and answers some problems that may arise under § 301; that "[o]ther problems will lie in the penumbra of express statutory mandates"; and that still other problems "will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.* And the Court has also recognized that "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." *Id.* Any such state law is "absorbed as federal law" and does not provide "an independent source of private rights." *Id.*

By a parity of reasoning, the Court's task, in developing a federal common law of employee benefit plans, is to look first and foremost to the policies of ERISA, and to borrow state-law rules to the extent such rules will "effectuate" those policies. Although it is surely appropriate to look to the law of trusts as a principal source in developing this federal common law, the federal courts are not *obligated* to apply trust-law willy-nilly in ERISA cases. Indeed, the legislative history of ERISA shows that one reason for its enactment was Congress' conclusion that "reliance on conventional trust law often is *insufficient* to adequately protect the interests of plan participants and beneficiaries" as "the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from testa-

mentary trusts both in purpose and in nature." S. Rep. 93-127, 93rd Cong. 2d Sess. 29 (1974), 1 Leg. Hist. 615 (emphasis added); H.R. Rep. 95-533, 93rd Cong. 2d Sess. 12 (1974), 2 Leg. Hist. 2359 (emphasis added).

C. (1) The task here, then, is to define, through the federal common law of employee benefit plans, the appropriate scope of judicial review with respect to claims of the type plaintiffs here assert. To do so it is necessary first to identify clearly the nature of plaintiffs' complaint.

In asserting that they were wrongfuly denied severance pay, plaintiffs here are *not* challenging the exercise of any authority which is inherently discretionary in nature. This case would be quite different if the plan had left it to the fiduciary to fix eligibility conditions, or if the plan contained eligibility conditions framed in a manner designed to leave such decisions to the judgment of the fiduciary rather than to fixed rules. Under such hypothetical plans the fiduciary's task is *not* confined to ascertaining the meaning of the settlor's instructions and executing those instructions; rather such plans require the fiduciary to make a discretionary judgment as to when and to what extent benefits should be paid. We agree with Firestone that when a court is called upon to review an exercise of such discretionary authority "the court[] must defer to those to whom decisionmaking authority has been committed" lest the court "improperly substitute [its] judgment for that of the person who has both the duty and the rightful authority to decide." Pet. Br. 10.

In this case, however, Firestone's severance pay plan did *not* call for the exercise of such discretion; the plan provided that severance benefits are to be paid to each and every employee terminated due to a "reduction in force" and to no others. "The [administrator's] duty . . . is to provide specific benefits to those who are entitled to then in accordance with the specific terms of [the] plan." *Central States Pension Fund v. Central Transp., supra,* 472 U.S. at 576-87. And plaintiffs' claim is simply that Firestone, as plan administrator, breached that duty because Firestone misconstrued the plan; *viz.,* that plaintiffs were "terminated" due to a "reduction-in-force" within the meaning of the severance pay plan and that therefore Firestone was obligated to pay, and plaintiffs were entitled to receive, severance benefits.

To be sure, the phrase "reduction in force" is not self-defining but rather is subject to alternative interpretations and thus in deciding whether to award benefits to plaintiffs, Firestone, as plan administrator, was required, in the first instance to render its best judgment as to the meaning of the critical phrase in the severance pay plan; *viz.,* to reach a decision as to whether, in its view, the term "reduction-in-force" as used in the plan encompasses terminations resulting from the sale of a plant as an ongoing business. That is as pure a question of plan interpretation as can be imagined. And nothing in the plan instrument itself purports to commit such a decision as to the meaning of that document to the discretion of the plan administrator or otherwise to render the administrator's view as to the meaning of the plan conclusive.

Against this background, the basic issue posed by this case can be formulated as follows: under the federal common law of employee benefit plans, are questions of plan interpretation to be treated, by operation of law, as judgments for plan administrators to make subject to only a limited power of judicial review to assure that the interpretation is not irrational or, absent some contrary expression in the plan instrument, are these questions—like contract interpretation questions generally—ones of law for the courts to resolve.

As the court below recognized, however, to frame the question for decision here at that level of generality ig-

nores the most salient fact about this case. The administrator who claims deference for its interpretation in this instance—who claims that its interpretation of the plan must prevail so long as that interpretation is not arbitrary—is the *employer* who would have to pay over six million dollars in benefits if a contrary interpretation of the plan were adopted. Moreover, as the court of appeals explained, "[b]ecause the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." Pet. App. A21-22.

In this case, then, as in any case involving an employer-administered unfunded benefit plan, the employer/plan administrator, in interpreting the eligibility rules in the plan, faces a conflict of interest to a degree unknown to the historic law of trusts. For whereas the law of trusts presupposes the existence of identifiable property held in trust from which trust benefits are paid, *see* p. 16 *supra*, in an unfunded, employer-administered employee benefit plan any benefits that are awarded are paid directly out of the pocket of the employer-fiduciary.[19]

It follows, then, that the dispositive question posed here can be reformulated as follows: under the federal

[19] Firestone argues that in some funded trusts—particularly some defined-benefit pension plans—the settlor/employer is obligated to contribute enough money to the trust to fund all claims that the trustees pay and that in these situations the employer trustees have the same type of conflict of interest as exists in an unfunded plan. *See* Pet. Br. at 21. But in these defined-benefit plans, the immediate impact of a decision to grant or deny benefits is on the *trust itself* and not on the employer; only if the total of *all* claims paid exceeds the actuarially anticipated amounts would benefit decisions by a trustee have a financial impact on the employer. Thus, the court of appeals' decision in the instant case as to the scope of review of the fiduciary's decision has no necessary implication with respect to the scope of review of questions of plan interpretation by employer trustees of a funded defined-benefit pension plan.

common law of employee benefit plans, are the federal courts required to defer to the interpretation of plan instruments adopted by a self-interested employer/plan administrator where the plan instruments themselves do *not* purport to vest the administrator with the power to authoritatively determine the meaning of those documents.

(2) Nothing in the text of ERISA itself answers this question or, indeed, answers any question concerning the scope of judicial review under § 502(a)(1)(B). The language of that section, authorizing a cause of action "to recover benefits due . . . to enforce . . . . . . rights . . . or to clarify . . . rights . . . under the terms of the plan" is, to be sure, suggestive; that language does not bespeak a cause of action whose only office is to provide for an administrative-type review of benefit claims decisions. *Cf.* § 706 of the Administrative Procedure Act, 5 U.S.C. § 706. But we do not claim that the bare words alone are so clear as to be determinative.[20] Nor so far as our research discloses, is there anything in the legislative history directly on point. It is thus necessary, in fashioning a federal common law rule here, to "look at

[20] Firestone suggests that two sections of ERISA in terms repose a discretionary authority in fiduciaries to interpret plans. *See* Pet. Br. at 9-10. But while ERISA § 402, requires that every plan must have a fiduciary with the authority to manage the plan, and while ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), defines the term "fiduciary" to include every person with discretionary authority in an employee benefit plan, nothing in those sections purport to determine the *amount* of discretion that must be vested in the fiduciary or to require that the fiduciary be authorized to determine the meaning of plan documents. Indeed, ERISA's legislative history reveals that the reason that § 402 requires one or more "named fiduciaries" for employee benefit plans is so that "the employees may know who is responsible for operating the plan," H.R. Rep. 1280, *supra*, at 297, 3 Leg. Hist. 4564 (conference report); the section thus was not intended as an allocation of authority with respect to questions of plan interpretation.

the policy of the legislation." *Textile Workers v. Lincoln Mills*, *supra*, 353 U.S. at 457.[21]

It is a commonplace that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1985). In enacting ERISA Congress sought "to protect contractually defined benefits," *Massachusetts Mut. Life Ins. Co. v. Russell*, *supra*, 473 U.S. at 148, and to assure, as this Court has said several times, "that if a worker ha[s] been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980).

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[21] Although we have not found any direct discussion of the scope of review under § 502(a)(1)(B) in the legislative materials, it is noteworthy that, when Senator Javits first proposed creating a federal cause of action to enforce employee benefits plans in a bill that led directly to the enactment of ERISA, *see* S. 1103, § 504, 90th Cong., 1st Sess. (1967), he stated that his bill "permits private parties to sue for rights guaranteed by the bill *as well as for breach of any contract or trust guaranteeing them any rights.*" 113 Cong. Rec. 4653. This is the only explanation Senator Javits offered for the provision which found its way into each of the subsequent versions of his pension reform bills, the final one of which, S.4, 93rd Cong., 1st Sess. (1973), 1 Leg. Hist., ultimately was enacted by the Ninety-Third Congress as ERISA. *See* S. 2167, 91st Cong., 1st Sess. (1969); S.2, 92nd Cong., 1st Sess. (1971); S. 3598, 91st Cong., 2nd Sess. (1972). *See also* 2 Leg. Hist. 3376 (Rep. Dent) (ERISA includes "civil *contractual* remedies").

Firestone attempts to draw comfort from the fact that in enacting § 502(a)(1)(B), Congress rejected a proposal to require plans to provide participants with the option of submitting benefit disputes to arbitration or to judicial review. *See* Pet. Br. at 15-17. The only explanation the legislative materials give for why this provision was dropped in conference is Senator Javits' statement that the "House conferees were opposed . . . on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes." 120 Cong. Rec. 29941 (1974), 3 Leg. Hist. 4769. But the fact that Congress rejected an arbitration requirement—which would have provided a means "for the resolution of minor benefit disputes for the many participants and beneficiaries who lack the resources to pursue their claims through the courts," *id.* (Sen. Javits)—says nothing about the standard of review Congress intended for those more consequential benefit disputes that are brought to court.

Firestone is even wider of the mark in attempting to rely on the fact that in 1982 a bill which would have provided *de novo* review of all decisions denying benefits was introduced in the House of Representatives by Representative Frank but was never acted on. *See* Pet. Br. at 19-20. It is well-settled that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). And in any event, the fact that the 1982 Congress failed to act on the Frank bill says nothing about that Congress' views as to the appropriate scope of review of the denial of benefits under ERISA.

These employee-protective purposes would be substantially undermined if the federal common law were to mandate deference to plan interpretations rendered by self-interested employer/plan administrators when nothing in the plan itself (or in the nature of the decision made by the administrator) requires such deference.

It is one thing to defer to a self-interested fiduciary's exercise of an inherently *discretionary* authority conferred upon the fiduciary by the plan itself; as Firestone correctly observes, in such situations—where there is, by hypothesis, no legal standard to control the fiduciary—the only alternative to such deference would be for the court to "substitute [its] judgment for that of the person who has both the duty and the rightful authority to decide." Pet. Br. at 10.

But the precise issue here is who has the "rightful authority" to determine the meaning of ERISA plans. And it would be quite another thing to *expand* the scope of the self-interested employer/administrator's authority beyond that provided for by the plan by holding that questions of plan interpretation—which the courts are competent to decide on their own as contractual ques-

tions [22]—are nonetheless committed to such administrators as a matter of law. Given what the court below aptly termed the "significant danger" that self-interested employer/administrators would abuse that authority if granted, the policies underlying ERISA require a federal common-law rule that, at least absent anything in the plan committing questions of plan interpretation to the administrator, leaves such questions of interpretation to the courts, rather than to the self-interested employer/administrator.[23]

(3) Contrary to Firestone's suggestion, nothing in the law of trusts requires or even supports a contrary conclusion; indeed if the law of trusts were directly applicable here—and it is not—or if the Court were to turn to that body of law to derive the federal common

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[22] As the court below observed, questions of plan interpretation "do not usually turn on information or experience which expertise as a claims administrator is likely to produce." Pet. App. A22.

[23] Firestone argues that questions of plan interpretation can be committed to self-interested employer/administrators without danger because "ERISA provides a plethora of substantive constraints on fiduciaries' actions that together with the flexible arbitrary and capricious standard ensure the proper administration of benefit plans." Pet. Br. at 30. But ERISA § 404(a)(1)'s requirement that fiduciaries act "solely in the interest of the participants and beneficiaries" cannot meaningfully be applied to review decisions by a plan administrator as to the meaning of an unfunded plan, because given the open-ended obligation of the employer who has created such a plan to fund any benefits the administrator awards, it is *always* in the best interest of the participants and beneficiaries to interpret an unfunded plan in favor of coverage and it is *never* possible to ascertain whether an employer/administrator who has rejected such a pro-employee interpretation of the plan was animated by his own self-interest or by a disinterested judgment as to the proper meaning of the plan documents. Nor does the "arbitrary and capricious" rule provide significant protection against plan interpretations animated by the employer's self-interest, because under that rule the only question the court can decide is whether the employer/administrator has arrived at a *rational* interpretation of the plan.

law rule, the conclusion would be no different than the one derived from ERISA's policies.

(a) Insofar as Firestone looks to trust law to support its plea for deference, Firestone relies on the vernable principle codified in § 187 of the *Restatement (Second) of Trust*, that

> "*Where discretion is conferred upon the trustee with respect to the exercise of a power*, the exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion." [Pet. Br. at 12.]

But Firestone proceeds as if the underscored clause did not exist, *viz.*, as if, under the law of trusts, *all* exercises of a power by a trustee were reviewable only to prevent an abuse of discretion. That is simply not the trust-law rule.

For purposes of determining the scope of judicial review of a trustee's action, the law of trusts draws a fundamental distinction between "mandatory" and "discretionary" (or "permissive") powers of trustees. As Professor Bogert explains in his treatise:

> The powers of trustees are . . . classified as discretionary and mandatory. . . . [I]f the power is discretionary, the trustee has a duty to employ his discretion in good faith, but the trustee has no duty to exercise the power. It is optional with him to use his power or to refrain from using it, unless to decline to exercise the power in light of the facts known to the trustee, would constitute bad faith toward the beneficiary. If, on the other hand, the power is mandatory, there is a positive duty to exercise the power by performing the act in question . . . [G. Bogert, *Trusts and Trustees* § 552 (2d ed. 1980); *see also Restatement (Second) of Trusts* § 186, Comment e & § 187, Comment a; 3 A. Scott, *Scott on Trusts* § 187 (4th ed. 1988)]

And if a power is mandatory

> The beneficiary has (1) the right that the trustee shall perform the trust in accordance with the directions of the trust instrument. . . . [I]f there is no grant of discretion of the trustee . . . the court may order that he perform a specific act. [G. Bogert, *supra*, § 861; *see also* 3 *Scott on Trusts* §§ 198.1, 199.1]

In this case, of course, Firestone, as plan administrator, was under a mandatory obligation to pay severance benefits to every employee terminated due to a "reduction-in-force." What is in dispute here is whether plaintiffs' termination constituted a reduction-in-force within the meaning of the plan. And in invoking *Restatement* § 187 to defend its resolution of that question, Firestone necessarily contends that the power to interpret the plan is, as a matter of trust law, itself a discretionary function of the fiduciary.

That contention rests on a concept that is alien to the law of trusts; trust law—like contract law—assumes that it is ordinarily for the *courts* to determine the meaning of legal documents such as trust instruments. As Professor Scott explains,

> The extent of the duties and powers of a trustee is determined by the rules of law which are applicable to the situation, and not the rules which the trustee or his attorney believes to be applicable, *and by the terms of the trust as the court may interpret them and not as they may be interpreted by the trustee himself or by his attorney.* [3 *Scott on Trusts* § 201 (emphasis added); *see also Restatement (Second) on Trusts* § 201, Comment b]

Indeed the law of trusts recognizes a special cause of action by which "the beneficiaries can maintain a suit in equity in order to obtain the instructions of the court to the trustee as to his duties," and the trustee "can ob-

tain instructions from the court," 3 *Scott on Trusts* §§ 199.1, 259.

This Court made this very point—and drew the critical distinction between mandatory and discretionary duties—in *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), in the course of overturning a lower court ruling which had found a portion of a trust fund agreement to be arbitrary and hence invalid under LMRA § 302. Writing for the Court, Justice Stevens explained that the court of appeals had

> relied upon cases in which trustees of employee benefit trust funds . . . fixed the eligibility rules and benefit levels. The court of appeals has held in those cases "that the Trustees have 'full authority with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustee's broad discretion has been abused by the adoption of arbitrary and capricious standards." [455 U.S. at 573.]

And Justice Stevens' explanation of why those cases were inapposite in *Robinson* is directly relevant here:

> Those cases, however, provide no support for the Court of Appeals' holding in this case. The petitioner trustees were not given "full authority" to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective-bargaining agreement. *By the terms of the trust created by that agreement, the trustees are obligated to enforce these determinations unless modification is required to comply with applicable federal law. The common law of trusts does not alter this obligation.* [*Id.* at 573-74.] [24]

[24] For the reason explained by Justice Stevens in *Robinson*, Firestone's reliance in this case on the § 302 cases applying the arbitrary and capricious standard of review is wholly misplaced. *See* Pet. Br. at 13 & n.10.

(b) The foregoing doctrine is subject to one important caveat. Under the law of trusts, a settlor, in creating a trust, "may give the trustee power to construe the trust instrument in case of dispute or doubt." G. Bogert, *supra*, § 559. Such an instrument confers on the trustee a *discretionary* power—the power of interpretation—and thus, under the principles set forth above, "the trustee's decision will be subject to review by the courts as to its reasonableness." *Id.* But absent such an *express delegation* of interpretive authority to a trustee, it is for the courts to determine the proper meaning of trust instruments.[25]

These principles are well-illustrated by the many pre-ERISA cases in which an employee or retiree sued to obtain benefits from an employee benefit plan established in trust form. Those cases divide naturally into two groups: cases in which the trust instrument left it to the trustees to interpret the eligibility conditions set forth in the trust and cases in which the trust instrument established eligibility conditions but was silent as to whose function it was to interpret those conditions in cases of disputes.

In the former category of cases, the courts generally proceeded on the premise that what was involved was an exercise of discretionary authority, and the courts re-

[25] *See also Central States Pension Fund v. Central Transp., supra*, 472 U.S. at 568, in which the Court stated:

> The trustees' determination that the trust documents authorize their access to records here in dispute has significant weight, for the trust agreement explicitly provides that "any construction [of the agreement's provisions" adopted by The Trustees in good faith shall be binding upon the Union, Employees and Employers." . . . [T]hus, if our inquiry were merely an inquiry into the trust agreement, the trusttes' right to conduct the audit in question would seem clear.

Cf. also Pray v. Belt, 26 U.S. 670, 680 (1828).

viewed the trustees' interpretation only for an abuse of discretion.[26] But in the latter cases the *courts proceeded on the premise that it was a judicial responsibility to determine the meaning of the trust, and where the courts determined that, properly understood, the trust required a payment of benefits in a particular case, the courts entered an appropriate order to that effect.*[27]

Thus, in this case, the meaning of the phrase "reduction-in-force" is a question for the *courts*, and not a question for the fiduciary to resolve in his discretion subject to only limited, deferential medical review.

III. FORMER EMPLOYEES CLAIMING A RIGHT TO BENEFITS UNDER AN EMPLOYEE BENEFIT PLAN ARE "PARTICIPANTS" ENTITLED TO RECEIVE, UPON WRITTEN REQUEST, CERTAIN SPECIFIED DOCUMENTS CONTAINING INFORMATION ABOUT THE PLAN.

In addition to asserting a claim for severance pay, plaintiffs' complaint sought damages for three of the individual plaintiffs whose requests for copies of Firestone's severance plan and stock plan were ignored by the Company. Plaintiffs predicated that claim on ERISA §§ 502(a)(1)(A), (c), which together authorize a "participant or beneficiary" to bring suit for damages "in the amount of up to $100 a day," to be awarded "in the court's discretion," against an administrator "who fails to comply with a request for any information which such administrator is required by this Title to furnish to a participant or beneficiary."

[26] *See, e.g.*, the cases cited by Firestone at 25 n.22 and those cited by the Chamber of Commerce and National Association of Manufacturers as *amici curiae* at 13-14.

[27] *E.g., Lamphere v. Old Second National Bank*, 39 Ill. App. 3d 610, 350 N.E. 2d 272 (1976); *Foss v. Mahal*, 230 N.W.2d 604 (Minn. 1975); *Frank v. Day's*, 13 Wash. App. 401, 535 P.2d 479 (1975); *see also* cases cited pp. 17-18 *supra*.

Firestone contends that the Company acted lawfully in failing to supply these plaintiffs with the requested documents because, according to Firestone, at the time of the requests the plaintiffs were no longer "participants" in the plans and hence were not entitled to any information about the plans. As we proceed to show, the language, structure, and history of the pertinent provisions of the Act belie Firestone's contention.[28]

A. ERISA §§ 101-111, 29 U.S.C. §§ 1021-31, contain a comprehensive set of disclosure provisions (as well as a set of reporting provisions which generally require plans to file various reports with the Secretary of Labor). These provisions are of two distinct types: provisions requiring disclosure automatically and without request, and provisions requiring disclosure in response to specific information requests.

Section 101(a), 29 U.S.C. § 1021(a), states the general rule with respect to automatic disclosure:

> The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

[28] It is important to bear in mind that at least with respect to plaintiffs Smolinski and Schade, who made request for documents pertaining to Firestone's severance-pay plan, Firestone's contention that those individuals were not participants rests on its claim that they were properly denied severance pay. Thus, under Firestone's theory, until a final determination is made with respect to the merits of plaintiffs' severance-pay claim, plaintiffs' status as participants *vel non* cannot be finally decided.

Because plaintiff Bruch made a request for documents pertaining to the stock plan but no longer claims that he was entitled to additional benefits beyond the stock he already had received under that plan at the time of his request, Bruch's status as a participant can be finally determined without further proceedings. For the reasons that follow, we submit that because Bruch was claiming additional benefits as of the time of his request, he was a participant entitled to the documents he sought.

> (1) a summary plan description described in section 102(a)(1); and
>
> (2) the information described in sections 104(b)(3) [statements and schedules summarizing the latest annual report] and 105(a) [statements of benefits accrued] and (c) [statement required by I.R.C. § 6057].

Section 104(b)(4), 29 U.S.C. § 1024(b)(4), in turn, states the analogous rule with respect to disclosure in response to an information request:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. . . .

Significantly, these two provisions use very different terms to define the class of persons to whom the disclosure obligation run. In recognition of the fact that the automatic disclosure provisions impose on benefit plans the obligation to locate and mail documents to certain individuals, § 101(a)(1) limits the application of these provisions to "each participant covered under the plan"—a phrase which the Department of Labor has treated as a term of art defined in an extensive set of regulations, *see* 29 C.F.R. § 2510.3-3(d)—and to "each beneficiary receiving benefits under the plan." In contrast, because under § 104(b)(4) the burden is upon the individual who wants to review a document to make a request and the only obligation on the plan is to furnish copies of certain readily-available documents upon request (and at the expense of the person making the request), that section grants this right of access to "*any* participant or beneficiary."[29]

[29] Similarly, ERISA § 104(b)(2), 29 U.S.C. § 1024(b)(2), which requires plan administrator to make certain documents available

In promulgating its regulation defining "participant under the plan," the Department of Labor highlighted the difference in coverage between the automatic disclosure requirements contained in § 101(a) and the on-request requirement contained in § 104(b)(4). In its preamble, the Department noted that ERISA's definition of "participant" is "broad enough to include many individuals whose interest in an employee benefit plan is minimal," and the Department agreed with commentators who had argued that requiring plans to provide plan documents automatically to all of these individuals might be unduly burdensome. 40 Fed. Reg. 24,642, 24,649. The Department concluded, however, that:

> Under section 101(a) of the Act, these documents must be furnished to each "participant covered under the plan," not to each participant. *By using the term "participant covered under the plan" Congress provided a ground for distinguishing between the class of all participants included within the meaning of section 3(7) of the Act and the class of participants who are entitled to receive copies of plan documents without charge and without request. . . .*
>
> Although under these paragraphs participants who are not covered under the plan will not be entitled to receive plan documents without charge and without request, they will be entitled to access to plan documents which the plan administrator must make available to all participants at appropriate locations under section 104(b)(2) of the Act. *They may also obtain copies of certain plan documents—including those which must be furnished to participants covered under the plan—upon written request at a reasonable charge under section 104(b)(4) of the Act. . . . These disclosure rights are sufficient to ensure*

for inspection at the "principal office of the administrator," provides for inspection of these documents "by any plan participant or beneficiary." The documents that must be available for inspection under § 104(b)(2) are the only documents that must be mailed upon request under § 104(b)(4).

> *that participants who are not covered under the plan and, therefore, not entitled to free distribution of plan documents will be able to obtain such information as may be necessary to protect their rights.* [40 Fed. Reg. at 24,649 (emphasis added).[30]

As the agency charged with the responsibility of administering ERISA's disclosure provisions, the Department of Labor's interpretation of those provisions is entitled to "great deference," *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and "should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). Thus, proper analysis must start from the premise that the § 104(b)(4) duty to provide documents on request is owed to a broader class of persons than the duty to make automatic disclosure under § 101(a), a class which "include[s] many individuals whose interest in an employee benefit plan is minimal." The task here, then, is simply to define the scope of that broader class. As we proceed to show, the court of appeals correctly included within that class employees and former employees who claim an entitlement to benefits under an employee benefit plant.

B. (1) ERISA § 3(7), 29 U.S.C. § 1002(7), defines the term "participant" to mean "any employee or former employee of an employer . . . who is *or may become* eligible to receive a benefit of any type from an employee benefit plan which covers employee of such employer. . ." This definition is sufficiently broad to encompass all employees or former employees who claim to be entitled to benefits under a plan and thus in a literal sense "may become eligible" to benefits based on a subsequent determination of their entitlement to benefits by either the

[30] In light of the foregoing, Firestone's reliance on the regulations defining "participant covered by the plan" to establish the scope of the class entitled to request documents under § 104(b)(4), *see* Pet. Br. at 35-36 & n.34, is wholly misplaced.

plan or the courts. Nothing in the statutory language requires that the class be limited to the narrow group identified by Firestone: employees or former employees who currently are eligible for benefits or who will become eligible for benefits upon the occurrence of a future contingency, such as satisfaction of an age or service requirement.

That Congress intended the broader, rather than the narrower reading of the term "participant" is clear from the other contexts in which that term is used in the Act. Most significant in this regard is ERISA § 503, 29 U.S.C. § 1133, which requires every plan to establish an administrative claims procedure. As part of that procedure, the plan must "provide adequate notice in writing to *any participant or beneficiary whose claim for benefits under the plan has been denied,*" and must "afford a reasonable opportunity to *any participant whose claims for benefits has been denied* for a full and fair review" of that decision (emphasis added). *See Pilot Life Insurance Co. v. Dedeaux, supra*, 55 L.W. at 4474 (describing § 503). In these provisions, Congress expressly used the term "participant" to describe individuals who have claims for benefits against a plan, including claims for benefits that have been "denied" by the plan, and therefore Congress necessarily contemplated that an individual would retain his status as a "participant" even if his claim for benefits were denied. In fact, these provisions would be rendered meaningless if Congress did not intend for the class of "participants" under ERISA to include employees or former employees who file such claims.

Similarly, ERISA § 102(b), 29 U.S.C. § 1022(b), requires that the plan description and the summary plan description—which, as previously noted, are among the documents that any participant or beneficiary may request under § 104(b)(4)—must contain "the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the

redress of claims which are denied in whole or in part." It is reasonable to believe that Congress expected a description of the claims procedure to be provided to all individuals with claims against the plan, and not simply to those employees or former employees who are conceded by the plan, or adjudged by a court, to be entitled to receive benefits.

(2) The legislative history of the reporting provisions of ERISA confirms that the phrase "any participant" should be read broadly rather than narrowly in order to accomplish the purposes underlying those provisions.

ERISA's reporting and disclosure provisions replaced the much more limited disclosure provisions of the Welfare and Pension Plan Disclosure Act ("WPPDA"), *see* Pub. L. No. 85-386, §§ 6-9, 72 Stat. 999-1002, *repealed by* ERISA § 111(a)(1), 29 U.S.C. § 1031(a)(1). In enacting ERISA, Congress specifically found that the WPPDA was "inadequa[te]" to allow individual employees to "police their plans," and that the WPPDA needed to be strengthened so that "individual participants and beneficiaries will be armed with enough information to enforce their own rights." H.R. Rep. 93-533, *supra*, at 4, 11, 2 Leg. Hist. 2351, 2358; S. Rep. 93-127, *supra*, at 4, 27, 1 Leg. Hist. 590, 613. The House and Senate Committees elaborated:

> Experience has . . . demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan—what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. [H. Rep. No. 533, *supra* at 11, 2 Leg. Hist. at 2358; Sen. Rep. No. 93-127, *supra*, at 27, 1 Leg. Hist. at 613.] [31]

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[31] Although Firestone recognizes that "Congress considered the private enforcement provision in WPPDA to be ineffective," Pet.

The need of employees for information about their status under a plan was emphasized as well during the floor debates over ERISA. For example, Representative Erlenborn, a chief proponent of ERISA's disclosure requirements who served on the House Conference Committee and was a ranking member of the House Subcommittee on Labor that drafted these provisions, specifically noted that participants should have access to plan information even if they actually are not entitled to benefits:

> As a matter of fact, if people do have this sort of meaningful information made available to them, I think some of the unwarranted expectations that gave rise to the horror stories that people were not getting what they anticipated will be a thing of the past, *because many of them are based on what people anticipated getting that they never were entitled to, because they did not honestly know what was in*

Br. at 37-38, Firestone repeatedly argues that Congress "sought to strengthen [the WPPDA] by creating government enforcement mechanisms," *id.* at 38, 39, and *not* by "broaden[ing] the scope of the term 'participant' or the private enforcement mechanism with respect to a plan's disclosure obligations," *id.* at 36-37, 38, 39. These arguments are proven false, however, not only by the passages from the House and Senate Reports that are quoted in text, but also by comparing the applicable statutory provisions in the WPPDA and ERISA. For example, § 8(a) of the WPPDA required a plan to furnish, upon written request, a plan description and the latest annual report "to the participants and to the beneficiaries *covered by the particular plan,*" 72 Stat. 997, 1002 (emphasis added), whereas § 104(b)(4) of ERISA requires disclosure of these and other documents to "any participant or beneficiaries." Likewise, the enforcement provision found in § 9(b) of the WPPDA allowed damages against a plan administrator if he failed or refused to disclose documents to "a participant or beneficiary *covered by such plan.*" 72 Stat. 997, 1002 (emphasis added), whereas § 502(c) of ERISA allows damages against the administrator if he fails or refuses to disclose documents to "a participant or beneficiary."

> *their pension plan; they did not honestly know what their rights would be.* [120 Cong. Rec. 4284 (1974), *reprinted in* 2 Leg. Hist. at 3386-87 (emphasis added).]

Similarly, Representative Dent, another member of the House Conference Committee and the chairman of the House Subcommittee on Labor, noted that the disclosure provisions require that "a complete and full disclosure of a pension participant's standing within that pension plan be made available, and that it should be written in such a way that [an] individual[] would understand *exactly what his position was, what his entitlement was, and exactly where he stood at the moment of his inquiry.*" 120 Cong. Rec. 29,195 (1974), *reprinted in* 3 Leg. Hist. at 4665 (emphasis added). Indeed, the whole tenor of the discussion concerning disclosure to participants and beneficiaries emphasized the need for full and complete disclosure to all employees. In the words of Representative Biaggi, "the rules on disclosure of all information relating to pension funds are very, very strict. This is the only way abuse can be detected and corrected. Without information there is no protection. In this bill we are making sure there is going to be access to all relevant information." 120 Cong. Rec. 4287 (1974), *reprinted in* 2 Leg. Hist. at 3395.[32]

The purpose of Congress in enacting the disclosure provisions, as that purpose is explicated by the legislative materials, would not be served if the right to obtain plan information on request were limited to those employees or former employees who a plan concedes to be eligible (currently or in the future) for benefits. To the contrary, it was the clear intent of Congress to enable *all*

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[32] *See also* 120 Cong. Rec. 4278 (1974), *reprinted in* 2 Leg. Hist. at 3369 (statement of Representative Perkins) (ERISA "replaces the generalized reporting requirements of [the WPPDA] with disclosure and reporting requirements of a much more specific nature, which will give participants and beneficiaries a much better chance *to protect themselves*") (emphasis added).

interested employees to enforce their own rights against a plan, and that purpose can be accomplished only if all employees or former employees claiming benefits against a plan are granted access to plan documents upon request. As the court of appeals aptly concluded—and as common sense dictates—the congressional intent of "entitling people to information on the extent of their benefits, would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not. People who worked for a company for a time, and who are not certain whether or not they are entitled to benefits would obviously need the information . . . in order to know whether to press their claim." Pet. App. A42.[33]

C. Firestone contends that the appellate court's interpretation of the term "participant" would "turn plan administrators' disclosure requirements into an administrative nightmare." Pet. Br. at 40. This contention cannot withstand scrutiny.

The "administrative nightmare" perceived by Firestone is based on its mistaken view that all of the disclosure requirements of ERISA run to all "participants." As we have seen however, pp. 36-39 *supra*, the automatic disclosure provisions appearing in ERISA are limited in application by the language in §101(a) that disclosures must be provided only to "each participant *covered under the plan*," a phrase defined in detail by the Labor Department's regulations. The only disclosure requirements that apply to "*any* participant or beneficiary" are those triggered by a specific request by the participant or beneficiary. And complying with those provisions is relatively simple regardless of the breadth of the class to whom the provisions apply.[34]

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[33] The appellate court's conclusion in this regard is in general accord with the holdings of at least two other courts of appeals which have held that employees or former employees are "participants" if they have a "colorable claim" to benefits. *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 318; *Saldino v. ILGWU National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985); *cf. Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 660 (4th Cir. 1986) (individual listed as beneficiary but, denied benefits is a "participant" for purposes of filing a civil action). The Fifth Circuit originally reached a contrary conclusion, *see Nugent v. Jesuit High School*, 625 F.2d 1285, 1287 (5th Cir. 1980), as Firestone correctly observes, *see* Pet. Br. 33 n.30, but apparently unbeknowst to Firestone, that court subsequently appears to have retreated from its prior ruling on this issue, *see Paris v. Profit Sharing Plan*, 637 F.2d 357, 362 (5th Cir. 1981), *cert. denied*, 454 U.S. 836.

[34] It is also worth noting that there are a variety of provisions in ERISA and its implementing regulations which serve to minimize whatever burdens might be imposed on plans by the operation of § 104(b)(4). For example, under ERISA § 104(a)(3), 29 U.S.C. § 1024(a)(3), the Secretary of Labor is authorized to "exempt any welfare benefit plan from all or part of the reporting and disclosure requirements," and numerous regulations have been adopted pursuant to that authority to exempt such plans from § 104(b)(4). *See, e.g.*, 29 C.F.R. § 2520-104.20(a)(2) (exempting certain welfare plans with less than 100 participants); *id.* § 2520-104.21(a)(1) (exempting certain group insurance arrangements); *id.* § 2520-104.24 (exempting welfare plans maintained for a selected group of management or highly compensated employees); *id.* § 2520-104.25 (exempting day care centers).

Similarly, under ERISA § 110, 29 U.S.C. § 1030, the Secretary of Labor is authorized to prescribe alternative methods of compliance for pension benefit plans if, *inter alia*, the application of any reporting or disclosure requirement would "increase the costs to the plan" or "impose unreasonable administrative burdens with respect to the operation of the plan." Again, the Secretary has exercised this authority by adopting regulations to reduce the burdens that may be imposed by § 104(b)(4). *See, e.g.*, 29 C.F.R. § 2520-104.23 (exempting pension plans maintained for a select group of management or highly compensated employees). In addition § 110 allows the administrator of any particular pension plan to seek an alternative method of compliance by filing a separate petition with the Secretary of Labor.

Finally, under § 502(c), the "$100 a day" penalty for failing to disclose plan documents under § 104(b)(4) is expressly subject to the exercise of "the court's discretion," and as a result that penalty has been imposed only in limited circumstances. In addition, ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), specifically allows the

Indeed, rather than increasing the burdens on employee benefit plans, a broad interpretation of the phrase "any participant" as used in § 104(b)(4) actually may *lessen* the overall administrative costs incurred by such plans. If employees or former employees who believe that they may be owed benefits under a plan were not entitled to obtain copies of the plan documents through requests made pursuant to § 104(b)(4), the employees' only recourse for obtaining such documents and for testing their entitlement to benefits would be first by submitting claims to the plan and ultimately by commencing civil litigation and discovery. Freely granting employees and former employees who claim benefits access to plan documents upon request thus can be expected to *lower* plan costs by decreasing the number of claims for benefits that plans must process and the number of lawsuits that plans must defend.

For all these reasons, the court below correctly concluded that so long as plaintiffs were pursuing a claim for benefits, they were "participants" entitled to be provided with plan documents on request.

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court to grant "a reasonable attorney's fee and costs of action to *either* party" (emphasis added), and this provision also may be utilized to discourage any frivolous or bad-faith lawsuits that might be filed under § 104(b)(4). *See, e.g., Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

In addition to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq., reprinted at Pet. App. A77-85, the following additional provisions of that Act are involved here:

§ 101, 29 U.S.C. §1021. Duty of disclosure and reporting

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

* * * *

§ 409, 29 U.S.C. § 1109. Liability for breach of fiduciary Duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

* * * *

§ 502, 29 U.S.C. § 1132. Civil enforcement

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * *

(c) Any administrator (1) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant or beneficiary, or (2) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant for beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

* * * *

§ 503, 29 U.S.C. § 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.